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FIREMAN'S FUND INSURANCE COMPANY,  
a California corporation a/s/o BASIC RESOURCES,  
INC. and GEORGE REED, INC., California  
corporations

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation  
a/s/o BASIC RESOURCES, INC.  
and GEORGE REED, INC., California  
corporations,

Plaintiff,

vs.

GERLING AMERICA INSURANCE  
COMPANY, a foreign corporation,

Defendant.

CASE NO. C 07 06302 CRB

**FOURTH AMENDED COMPLAINT**

Plaintiff, FIREMAN'S FUND INSURANCE COMPANY ("FFIC") a/s/o BASIC  
RESOURCES, INC. ("BASIC RESOURCES") and GEORGE REED, INC. ("GEORGE REED")  
by and through their undersigned counsel, and pursuant to the Federal Rules of Civil Procedure, as  
well as the additional legal authorities cited herein, respectfully sue the defendant, GERLING  
AMERICA INSURANCE COMPANY ("GERLING") and so alleges:

**PARTIES**

1  
2 1. At all times material, FFIC was and remains a California insurance corporation,  
3 existing under the laws of the State of California, and registered throughout the numerous States  
4 and is thereby authorized to conduct business in the State of California.

5  
6 2. At all times material, FFIC insured BASIC RESOURCES, a California corporation,  
7 existing under the laws of the State of California, with its principal place of business at 928 12<sup>th</sup>  
8 Street, Modesto, CA 95354 and GEORGE REED, a California corporation, existing under the laws  
9 of the State of California, with its principal place of business at 928 12<sup>th</sup> Street, Modesto, CA  
10 95354, under a policy of insurance numbered S08MZX80757126 ("the FFIC Insurance Policy").

11 3. FFIC is subrogated, both legally and equitably, to the interests of its insureds,  
12 BASIC RESOURCES and GEORGE REED to the extent of certain insurance payments made by  
13 FFIC to these insured's pursuant to the policy with respect to the insured's claim for property  
14 damages incurred as a direct result of an explosion of a 12,000 pound Stationary Asphalt Batch  
15 Plant (the "Plant").

16  
17 4. At all times material, GERLING was and remains a foreign insurance company,  
18 existing under the laws of the State of New York. Upon information and belief, GERLING was  
19 also, at all times material, and remains registered with the State of California, Department of  
20 Insurance; GERLING is thereby authorized to do business and is doing business in the State of  
21 California. At all times material, GERLING insured GENCOR INDUSTRIES, INC. ("GENCOR")  
22 a Delaware corporation whose principal place of business and corporate headquarters are located at  
23 5201 N. Orange Blossom Trail, Orlando, Florida 32810, per the Policy of Insurance attached hereto  
24 as Exhibit 1.  
25  
26  
27  
28

1 **STATEMENT OF JURISDICTION**

2 5. This Court has original diversity jurisdiction of this matter pursuant to 28 U.S.C. §  
3 1332 in that this matter is a civil action between citizens of different states in which the amount in  
4 controversy exceeds \$75,000.00.

5 **STATEMENT OF VENUE**

6  
7 6. Venue is proper in the San Francisco Division of the Northern District of California  
8 because GERLING does business in the State of California including the Northern District of  
9 California and because the Northern District was chosen by GERLING as the most convenient  
10 venue for this case.

11 **GENERAL ALLEGATIONS**

12  
13 7. On or about February 8, 2000, BASIC RESOURCES and GEORGE REED entered  
14 into a written contract with GERLING's insured, GENCOR, for the purchase of the parts  
15 comprising the Plant which was constructed by GEORGE REED. FFIC is not suing on the  
16 underlying contract and therefore does not attach a copy of the GENCOR Contract.

17 8. GENCOR sold the parts to BASIC RESOURCES and GEORGE REED for  
18 \$1,989,679.00, and thereafter provided technical services including "start-up" for operation of the  
19 Plant.  
20

21 9. On or about April 18, 2001, the Plant exploded, causing significant and extensive  
22 property damage and causing additional damages, including but not limited to out-of-pocket  
23 expenses, replacement costs, repair and reimbursement costs, property damages, loss of profits, and  
24 business interruption damages.

25 10. Thereafter, BASIC RESOURCES and GEORGE REED timely presented their claim  
26 for damages to FFIC. FFIC responded by conducting an investigation of the cause of the explosion  
27 and resulting damages and determined that the claim was "covered" under the FFIC policy issued to  
28

1 BASIC RESOURCES. Accordingly and pursuant to the terms of the policy, FFIC paid the claim of  
2 its insured, less the deductible. By so doing, and as a matter of law and of fact, FFIC was and  
3 remains subrogated to all of the rights, demands, and claims of its insured against any and all third  
4 parties whose acts or omissions caused or contributed to the explosion and resulting damages.

5  
6 11. Thereafter, FFIC sued GENCOR in an action entitled "Fireman's Fund Insurance  
7 Company, a foreign corporation, as Subrogee of (a/s/o) Basic Resources, Inc., and George Reed,  
8 Inc., a foreign corporation v. Gencor Industries, Inc., a foreign corporation" in the 9<sup>th</sup> Judicial  
9 Circuit Court in and for Orange County, Florida, Case No.: 04-CA-7746, Division 32; Complex  
10 Business litigation Court, (the "State Court Action").

11  
12 12. GERLING defended its insured, GENCOR, in the State Court Action up to and  
13 including a trial by jury. On January 26, 2007, the jury returned its verdict in favor of FFIC  
14 determining that GENCOR breached the Contract with BASIC RESOURCES/GEORGE REED and  
15 that GENCOR was negligent.

16  
17 13. On June 11 2007, the Amended Final Judgment in the State Court Action was  
18 entered against GENCOR in the sum of \$1,751,913.10 (exclusive of attorneys' fees and costs). A  
19 copy of the Amended Final Judgment is attached as Exhibit 2.

20  
21 14. On September 7, 2007, A Final Judgment awarding Costs was entered in the State  
22 Court Action in the sum of \$42,000.00. A copy of the Final Judgment awarding Costs is attached as  
23 Exhibit 3.

24  
25 15. GERLING's Policy of Insurance, pursuant to which GERLING defended GENCOR  
26 in the State Court Action, provides coverage for the FFIC claim for damages as particularly set forth  
27 in the Amended Final Judgment, including FFIC's \$42,000.00 in costs. GERLING, however, has  
28 denied FFIC's claims for such coverage.

1           16.     In its capacity as a Judgment Creditor in the State Court Action, FFIC is an intended  
2 third-party beneficiary under GERLING's Policy of Insurance.

3           17.     GERLING's Policy of Insurance was delivered to GENCOR in the State of Florida  
4 and includes applicable Florida coverage endorsements because GENCOR's principal place of  
5 business was and remains in the State of Florida. The law of the State of Florida governs in  
6 determining the rights and obligations of the parties pursuant to that policy and in adjudging any  
7 breach thereunder by GERLING.  
8

9           18.     FFIC has performed all conditions precedent to bringing this action or such  
10 performance of conditions precedent have been waived. .

11                               **COUNT I: DECLARATORY RELIEF**

12           19.     FFIC realleges Paragraphs 1-18 as if fully set forth herein.

13           20.     This is a cause of action for Declaratory Relief brought pursuant to Sec. 86.04,  
14 Fla.Stat., with respect to GERLING's Policy of Commercial General Liability Insurance, pursuant  
15 to which GERLING provided GENCOR a defense in the State Court Action, and under which  
16 GERLING has failed and refused to satisfy the Amended Final Judgment and the Judgment for  
17 \$42,000.00 in Costs entered in favor of FFIC.  
18

19           21.     This cause of action presents no question/issues of fact to be resolved but rather  
20 seeks the Court's interpretations/construction of GERLING's Policy of Commercial General  
21 Liability Insurance insuring GENCOR on the date of the Plant explosion.  
22

23           22.     As the Judgment Creditor of GERLING's insured, GENCOR, FFIC brings this  
24 action as an intended third-party beneficiary to the insurance benefits and proceeds under the  
25 GERLING Policy. However, FFIC is in doubt as to its rights, powers, and/or privileges and in doubt  
26 as to GERLING's obligations, duties, liabilities and powers under such Policy, and so, seeks  
27 declaratory relief.  
28

1           23.     FFIC respectfully requests that this Court grant relief in the form of a Declaratory  
2 Judgment which clarifies, declares, and adjudicates the parties' respective rights and obligations  
3 with respect to FFIC's demand for satisfaction of the State Court Amended Final Judgment and  
4 Judgment for \$42,000.00 in Costs entered in FFIC's favor and against GERLING's insured,  
5 GENCOR, and for all other relief deemed just and legally proper under the circumstances including  
6 an order requiring GERLING to satisfy the State Court Judgment and FFIC's costs, incurred in this  
7 action.  
8

9           **WHEREFORE**, FFIC demands entry of a Declaratory Judgment against GERLING,  
10 declaring GERLING contractually liable to provide insurance benefits to FFIC and to enter said  
11 Judgment against GERLING in the total amount of the State Court Amended Final Judgment  
12 together with the award of \$42,000.00 in Costs in favor of FFIC in the State Court Action, together  
13 with applicable Pre-Judgment interest and for all other relief deemed just and legally proper under  
14 the circumstances, including Post-Judgment interest and FFIC's costs, incurred in this action.  
15

16                           **COUNT II: BREACH OF CONTRACT**

17           24.     FFIC realleges Paragraphs 1-18 as if fully set forth herein.

18           25.     This is a cause of action for Breach of the GERLING Commercial General Liability  
19 Insurance Policy insuring GENCOR, pursuant to which GERLING provided GENCOR with a  
20 defense in the State Court Action, and under which, GERLING has failed and refused to honor its  
21 contractual obligations to satisfy the Amended Final Judgment, together with the additional  
22 \$42,000.00 in Costs entered in favor of FFIC in the State Court Action.  
23

24           26.     FFIC is an intended third-party beneficiary of the GERLING Policy of Insurance.

25           27.     GERLING is in material breach of the contractual duty owed to FFIC by failing and  
26 refusing to satisfy the Amended Final Judgment together with the Award of \$42,000.00 in Costs.  
27  
28

28. FFIC is entitled to recover the full amount of the Judgment up to the GERLING policy limit of One Million Dollars (\$1,000,000.00) and additional sums in excess of the policy limit of One Million Dollars for supplementary payments including "all costs taxed against the insured", pre-judgment interest and all interest on the full amount of the State Court Judgment.

**WHEREFORE**, FIREMAN'S FUND INSURANCE COMPANY, a foreign corporation a/s/o BASIC RESOURCES, INC., and GEORGE REED, INC., a foreign corporation, respectfully requests this Court to enter Judgment in favor of FFIC and against Defendant, GERLING AMERICA INSURANCE COMPANY, a foreign corporation, in an amount exceeding \$75,000.00 and for all other relief deemed just and proper under the circumstances, including the costs in bringing this action.

DATED: 10th DAY OF April 2008.

By: /s/ Jon D. Derrevere  
JON D. DERREVERE  
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Co-counsel for Plaintiff

**PROOF OF SERVICE**

*Fireman's Fund Ins. Co. v. Gerling American Ins.*

United States District Court, Northern District of California

Case No.: C 07 06302 CRB

I am employed in the City and County of West Palm Beach, State of Florida. I am over the age of 18 and not a party to the within action; my business address is: Derrevere, Hawkes & Black, 470 Columbia Drive, Building "B", West Palm Beach, Florida 33409.

On this 10th day of April, 2008, I served the foregoing document(s) described as:

**FOURTH AMENDED COMPLAINT**

On the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed enveloped addressed as stated below:

**[ ] BY REGULAR MAIL:**

I caused such envelopes to be deposited in the United States Mail at West Palm Beach, Florida with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with United States postal service each day and that practice was followed in the ordinary course of business for the service herein attested to.

**[X] BY ECF:**

I HEREBY CERTIFY that on this 10th day of April, 2008, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on: TINO X. DO, Barger & Wolen, LLP, 650 California Street, 9<sup>th</sup> Floor, San Francisco, CA 94108, tdo@barwol.com and CHARLES K. BRUNN, Brunn & Flynn, 928 12<sup>th</sup> Street, Suite 200, P.O. Box 3366, Modesto, CA 95354, CBrunn@Brunn-Flynn.com via transmission of Notices of Electronic Filing generated by CM/ECF.

**[X] FEDERAL** - I declare that I am employed in the office of a member of the Florida Bar, admitted to practice in all Florida Courts and who makes this Pro Hac Vice Application, that our co-counsel and sponsor is a member of the bar of this California Court, and at their direction this service was made. Executed at West Palm Beach, Florida on this 10th day of April, 2008.

NAME: Deanna N. Menendez

Signature: Deanna N. Menendez